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IN THE

Supreme Court of the United States

October Term, 1953.

No. 504.

ALEXIS I. duPONT BAYARD,
ERWIN M. BUDNER,
STANLEY ROSS,
STAR PUBLISHING COMPANY, a
Corporation of the State of Delaware,
Petitioners,

against

JOSEPH H. MARTIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

Petitioner prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Delaware [1] dated December 1, 1953, on which a mandate was entered January 13, 1954.

OPINIONS BELOW.

The opinion of the Court of Chancery (R. 140) is reported at 98 A. (2d) 780. The opinion of the Supreme Court (R. 160) is reported at 101 A. (2d) 329.

1. The Supreme Court, the Superior Court, and the Court of Chancery of the State of Delaware are referred to herein respectively as Supreme Court, Superior Court, and Court of Chancery or Chancery.

JURISDICTION.

The opinion of the Supreme Court was filed on December 1, 1953 (R. 160). The order directing entry of a mandate affirming the Court of Chancery's decision was entered January 13, 1954 but its issuance was stayed pending petition for a Writ of Certiorari in this Court (R. 144). The jurisdiction of this Court is invoked under 28 *U. S. C.* § 1257(3).

No issue under the Fourteenth Amendment of the Constitution of the United States was raised in the Court of Chancery, the court of first instance, because the motion for preliminary injunction in that court was believed by counsel to be addressed to the court's discretion to prevent irreparable injury to the moving parties under the prior decisions of that court in *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 14 Del. Ch. 117, 122 A. 142 (1923) and in *Sandler v. Schenley Industries, Inc., et al.*, 79 A. (2d) 606 (1951). The Court of Chancery treated this motion in accordance with counsel's understanding of its nature. *Bayard, et al. v. Martin, et al.*, (R. 140) 98 A. (2d) 780. The Court of Chancery made no findings of fact or conclusions of law relating to the status of the corporate petitioner in the questioned judgments and did not determine its legal relation to Respondent's alleged principal obligors.

On appeal to the Supreme Court the error urged was the Vice-Chancellor's abuse of discretion in denying the preliminary injunction by failing to apply the principles of *Sandler v. Schenley Industries, Inc., et al., supra; Allied Chemical & Dye Corp. v. Steel & Tube Co., supra.* The Supreme Court in its opinion dated December 1, 1953 *for the first time* injects the corporate petitioner's status as alleged principal obligor and its relation to Respondent as more than a "mere accommodation indorser" as the primary legal basis for affirming the Chancery Court ruling, *Bayard v. Martin*, 101 A. (2d) 329 (1953). This conclusion of law by the Supreme Court is based on findings of fact completely unsupported by the

record evidence and results from the application of legal principles not properly applicable to the facts disclosed in the record evidence.

The Supreme Court modified the basis for issuance of a preliminary injunction as previously set forth in *Sandler v. Schenley Industries, Inc., et al., supra,* and found facts and applied legal principles not applied in the Court of Chancery and without justification in the record evidence. These new elements injected by the Supreme Court which had not been urged in the court below by either party or relied upon by the court below in reaching its decision were pointed out for the first time and raised in Petitioners' petition for reargument (R. 171). The same objections to the court's decision were pointed out and raised in Petitioners' motions for a special mandate, their proposed form of special mandate and in their petition for leave to file an amended petition for reargument (R. 181-186). All of these matters were presented to the Supreme Court as denials of "due process of law" under the Fourteenth Amendment of the Constitution of the United States and were determined adversely to Petitioners in the denial of Petitioners' petition for reargument and motions for a special mandate (R. 192).

Petitioners could not anticipate that the Supreme Court would depart from the Court of Chancery's previous decisions beginning with *Allied Chemical & Dye Corp. v. Steel & Tube Co., supra,* and most recently affirmed in *Sandler v. Schenley Industries, Inc., et al., supra,* without purporting to overrule these decisions. Petitioners, likewise, had no reason to anticipate that the Supreme Court would find facts and apply legal principles completely departing from the previous holding of the Superior Court (R. 157, 158) which it purports to adopt here and reach a legal conclusion unsupported in the record evidence as the basis for affirming this decision of the court below when neither had been urged in nor considered by that court in reaching its conclusions and decision.

These denials to Petitioners of constitutional "due process of law" by the Supreme Court's determination of facts not supported by the record evidence were raised at the earliest possible opportunity because they could not have been known or anticipated by the Petitioners prior to the Supreme Court's decision filed December 1, 1953.

QUESTION PRESENTED.

I. Does the Supreme Court's finding of facts necessary to its decision, completely unsupported in and contradicted by the record evidence, amount to a denial of "due process of law" under the Fourteenth Amendment of the Constitution of the United States?

STATEMENT.

On October 3, 1946, Respondent, Joseph H. Martin (hereafter Martin), Petitioner, Star Publishing Company (hereafter Star), and J. Edwin Carter (hereafter Carter), executed a contract transferring all Star's outstanding stock from Martin to Carter for $140,500 (R. 92-94). At settlement on November 15, 1946 Carter paid Martin $35,000 and made Star joint maker on twenty-one judgment notes maturing serially and payable to Martin in the total sum of $105,500 for the balance (R. 94). Carter also signed these notes as his personal obligations (R. 67, 68). Martin confessed judgments on these notes against Carter and Star January 17, 1947 (R. 6). Carter defaulted on the August, 1949 installment; Star was bankrupt, at least in the equity sense, and Martin sought a substitute for Carter (R. 73, 74).

On October 12, 1949, Martin made an agreement with Petitioner, Stanley Ross (hereafter Ross) (R. 105). Martin released Carter from any unpaid judgments confessed on the notes given pursuant to the October 3, 1946 agreement (R. 106-108). Ross executed judgment notes payable to Martin which were identical in number and individual

amount to the unpaid judgments confessed January 17, 1947 from which Martin released Carter, *but not Star* (R. 105). Martin also released Carter from all liability under the October 3, 1946 agreement (R. 106-108). Carter transferred to Ross 87½% of Star's stock which Martin had sold to Carter by the October, 1946 contract.

Ross paid the August 1949 installment due from Carter before signing the October, 1949 agreement with Martin to prevent Star's bankruptcy (R. 19). Martin received his 1950 installments and one in February, 1951 while Star's new owners diligently examined its incomplete books and records trying to reorganize (R. 162). These extended examinations uncovered Martin's misrepresentations substantially reducing the value of Star's assets and its stock. All installment payments stopped (R. 162). On March 24, 1952, Martin issued executions on his judgments securing the August, 1951 and February, 1952 installments (R. 162). On March 31, 1952, Star filed motions in Nos. 492 and 493 January Term, 1947 in Superior Court seeking to open or, in the alternative, to vacate Martin's twenty-one judgments against Star for fraud and failure of consideration (R. 190-198).

On April 18, 1952, Martin commenced Civil Action No. 320—1952 in Superior Court against Petitioners Alexis I. duPont Bayard (hereafter Bayard), Erwin M. Budner (hereafter Budner), and Star for alleged breaches of the October, 1946 and October, 1949 contracts. Martin seeks recovery of the identical sums already reduced to judgments against Star by confession of the judgment notes executed as collateral security pursuant to the October, 1946 agreement (R. 85-92). Martin claims an additional $10,000 in tax refunds to Star allegedly due him under the October, 1946 agreement. Petitioners moved to dismiss Martin's complaint for its failure to state a cause of action (R. 85-92).

Star's motion to open or vacate these judgments and Martin's motion to dismiss were argued before the Honor-

able Caleb R. Layton, 3rd (hereafter Judge Layton), in Superior Court October 16, 1952. On November 5, 1952, Judge Layton denied Star's motion because he found no evidence of fraud or failure of consideration in the 1946 transaction (R. 147-151). On November 11, 1953, Judge Layton entered orders denying Star's motion to open or vacate these judgments, denying reargument on Star's motion, and denying stay of execution both pending appeal and until final judgment in Civil Action No. 320—1952 (R. 9). Star appealed to the Supreme Court, also obtaining a stay of execution pending appeal. *Star Pub. Co. v. Martin,* 95 A. (2d) 835, 836 (1953).

Petitioners' motion to dismiss Respondent's complaint in Civil Action No. 320—1952 was argued October 8, 1952. Judge Layton denied Petitioner's motion to dismiss Civil Action No. 320—1952 on June 11, 1952 (R. 153-160).

After its appeal to the Supreme Court in Nos. 492 and 493 January Term, 1947, Star moved to remand without decision to have certain newly discovered evidence admitted in Superior Court in support of its motion to open, vacate, or stay execution on these judgments. On March 5, 1953, the Supreme Court denied Star's motion because the newly discovered evidence related to 1949 transactions whereas its motion attacked 1946 judgments. *Star Pub. Co. v. Martin,* 95 A. (2d) 465, 470 (1953). But Star never argued that the 1949 transactions influenced the 1946 judgments, and the Supreme Court recognized this fact in its decision March 26, 1953, affirming Superior Court's denial of Star's motion to open or vacate these judgments. *Star Pub. Co. v. Martin, supra,* 835, 838, 839.

On April 6, 1953, Star filed a petition for reargument in the Supreme Court addressed to its opinion of March 26, 1953, affirming Superior Court's order of November 11, 1952, denying Star's motion to open or vacate these judgments. On April 6, 1953, Star also filed a motion for a special mandate from the Supreme Court directing Superior

Court to restrain execution on these judgments until final determination of Civil Action No. 320—1952 (R. 131, 132).

On April 7, 1953, Petitioners filed a complaint in Chancery and moved for a temporary restraining order and preliminary injunction enjoining Martin from executing on these collateral security judgments in Superior Court pending determination of Civil Action No. 320—1952 (R. 5-10). On April 8, 1953, Chancery granted Petitioners' motion for a temporary restraining order and fixed a hearing for a preliminary injunction (R. 10-13).

The Supreme Court denied Star's motion for a special mandate April 16, 1953 on the ground that it had no jurisdiction to direct Superior Court to enter an injunctive order because Superior Court lacked jurisdiction to issue injunctive process (R. 131, 132).

On July 22, 1953, Chancery entered an order denying Petitioners' motion for a preliminary injunction but continuing the effect of the April 8, 1953 temporary restraining order pending appeal to Supreme Court (R. 144, 145). Petitioners appealed to the Supreme Court; that Court affirmed Chancery's order on December 1, 1953 (R. 160-171). The Supreme Court stayed the mandate on its opinion pending petition for a Writ of Certiorari in this court (R. 192, 193).

REASONS FOR GRANTING THE WRIT.

1. Petitioners' status is legally and factually clear. Carter and Martin intended the judgments entered against Star in 1946 as collateral security for Carter's debt to Martin (R. 22, 23, 68, 93, 94, 106-108, 157, 158). Martin confessed these judgment notes before maturity with voluntary stay of execution until maturity (R. 158). This practice is a security device with long-standing, general acceptance in Delaware. *2 Woolley, Delaware Practice* (1906, § 954(b).[2] In 1949 Martin released Carter from this 1946 obligation and accepted Ross as Carter's substitute (R.

2. *2 Woolley on Delaware Practice* § 954(b) Pages 661-662, Appendix, *infra,* Page 19.

106-108). The 1946 Carter obligations no longer exist; these collateral judgments can no longer secure them.

Each judgment note recites that it is subject to the terms and conditions of the October, 1946 agreement. The October, 1949 agreement between Ross and Martin recites that Ross assumes Carter's obligations of the October, 1946 agreement (R. 105-106). Star (still controlled by Carter) consented to Carter's release in this 1949 novation (R. 108). Without Star's consent to Carter's release as principal, his release, by operation of law, released Star, the collateral security judgment debtor. *Sussex Finance Co. v. Goslee,* 82 A. (2d) 743 (1951); *W. T. Rawleigh Co. v. Warrington,* 199 A. 666 (1938); 72 *C. J. S. Principal and Surety,* § 223. All relevant record evidence conclusively establishes the parties' intention that Star's property be security for Carter's personal obligation (R. 22, 23, 68, 93, 94, 108, 153, 157, 158). These collateral judgments now secure the 1949 Ross obligation, whatever its amount.

But fraud taints this 1949 novation producing Ross' alleged damages which exceed the face amount of Ross' alleged contract obligation to Martin. *Bayard v. Martin, supra;* 329, 332. *Both obligations result from the 1949 novation. Neither Martin's contract claim nor Ross' fraud claim is reduced to judgment, only Star's collateral security judgments are entered.*

All payments stop. Martin demands that the individual Petitioners, against whom no judgments exist, pay these judgments without opportunity to finally determine their counterclaims against Martin, establish an off-setting counterclaim and prevent execution against Star on these collateral security judgments. The individual Petitioners refuse payment (R. 132-136). Martin issues execution against Star on these collateral security judgments to compel payment. Star moves to open, vacate or stay execution on these judgments pending determination of the balance and direction of obligation between Ross and Martin resulting from the 1949 novation. Martin files a separate ac-

tion to accelerate all future installments. Ross answers Martin's action with his counterclaim for Martin's fraud. Martin joins issue on Ross' counterclaim (R. 161, 162). *Bayard v. Martin supra,* 329, 331, 332.

The Superior Court denies Star's motion to open, vacate or stay execution on these judgments because there was no fraud in 1946, but holds that Martin and Carter intended these judgments as collateral security for the balance of the purchase price under the 1946 agreement (R. 147-160). Star appeals to the Supreme Court and then files a motion to remand without decision for newly discovered evidence. The Supreme Court refuses remand because the newly discovered evidence relates to the 1949 novation, not the 1946 agreement. *Star Pub. Co. v. Martin, supra,* 465, 470 (March 5, 1953). Next, Supreme Court affirms Superior Court's refusal to open or vacate these collateral security judgments because Star received consideration and there was no fraud relating to the 1946 agreement, and Star was not the proper party to redress 1949 fraud. *Star Pub. Co. v. Martin, supra,* 835, 838, 839 (March 26, 1953).

The Supreme Court concedes that Star primarily attacked the 1949 novation. The Supreme Court treats Star as "co-debtor" with both Carter and Ross on the principal obligation, denying Star's status as collateral security judgment debtor for Carter established in 1946, extinguished in 1949, renewed with Ross as principal obligor in 1949, and recognized by a Superior Court decision which Supreme Court says it adopts in determining Star's status. The Supreme Court also distinguishes a "substitution of obligors" from the classic novation. *Star Pub. Co. v. Martin, supra,* 835, 836 (R. 162). The Supreme Court purports to accept Judge Layton's finding that Star received valid consideration in the 1946 agreement and concludes therefrom that Star cannot be a "mere accommodation indorser" in the 1949 novation. *Star Pub. Co. v. Martin, supra,* 835.

But Star never claimed to be a "mere accommodation indorser". Star argued and Judge Layton concluded that *the parties intended these judgments as collateral security* in denying Star's motion to open, vacate or stay execution on them (R. 147-152). Later Judge Layton reaffirms his conclusion that the parties intended these judgments as collateral security in denying Petitioners' motion to dismiss Civil Action No. 320—1952 (R. 157, 158). *Judge Layton did not consider the 1949 novation* in denying Star's motion to open, vacate or stay execution on these collateral security judgments (R. 147-152). Judge Layton reviews the 1946 transaction alone and recognizes that 1946 fraud would require opening these judgments or staying their execution because they were merely collateral security (R. 149, 150). Since he found no 1946 fraud and *did not consider the 1949 novation,* he denied Star's motion (R. 147-152). Star's primary reason for appealing Judge Layton's decision was his failure to consider the 1949 novation and stay execution on these judgments pending final determination of Civil Action No. 320—1952. *Star Pub. Co. v. Martin, supra,* 465, 470.

Thus, the Supreme Court characterizes the 1949 novation using *only some* of the facts applicable to the 1946 agreement *alone,* and alters Judge Layton's basic conclusion of law, which it purports to adopt, that *the parties intended these judgments as collateral security* (R. 157, 158, 169). Another reargument petition and motion for a special mandate sought a direction that Superior Court stay execution on these judgments pending determination of Civil Action No. 320—1952 because earlier execution would prematurely determine the balance and direction of payment required by the 1949 novation. The Supreme Court denied this petition and motion because it required exercise of an equity power and exceeded Superior Court's jurisdiction (R. 131, 132).

Previously a collateral security judgment debtor was the proper party to prevent premature or otherwise improper execution. *2 Woolley, Delaware Practice* § 954(b).

Superior Court Civil Rules 60(b)(5) and (6) [3] enlarge Superior Court's inherent equity power to control its process. Here, Supreme Court destroys a collateral security judgment debtor's classic right to protection through stay of execution, and refuses application of *Superior Court Civil Rules* 60(b)(5) and (6) (R. 131, 132). The law court has no remedy for Star.

The individual Petitioners have no remedy at law because Martin's judgments are final, independent judgments (R. 6) and intervention is impossible. *Superior Court Civil Rule* 24.[4] Even if the individual Petitioners reduce their counterclaims to judgment in Civil Action No. 320—1952, they cannot off-set them against Martin's judgments (R. 6). Any judgments for the individual Petitioners in Civil Action No. 320—1952 are likewise final and independent of Martin's judgments. Thus, a battle of executions must ensue unless equity intervenes. The individual Petitioners, therefore, filed a Chancery action to enjoin execution on these judgments pending final determination of Civil Action No. 320—1952 and incidentally a determination of the individual Petitioners' damages resulting from Martin's fraud in 1949 (R. 5-10).

Burton v. Willin, 6 Houston 522 (1883) holds that equity must enjoin execution on a law judgment where loss of a proper set-off will otherwise result. *Superior Court Civil Rule* 13(a) [5] makes the individual Petitioners' counterclaims mandatory. *Staats v. Herbert*, 4 Del. Ch. 508, 516 (1872) requires equity to enjoin execution on a law judgment in excess of the parties' intentions and specified purpose. Chancery also has jurisdiction to enjoin contemplated action where the "balance of equities" relat-

3. 13 Del. C. Ann. (1953) Page 433, Appendix, *infra*, Page 18.

4. 13 Del. C. Ann. (1953) Pages 336, 337, Appendix, *infra*, Page 17.

5. 13 Del. C. Ann. (1953) Page 316, Appendix, *infra*, Page 17.

ing to plaintiff's "probable success" on final hearing and danger of "irreparable injury" show a net with plaintiff. *Bayard v. Martin, supra*, 835. Chancery treated this case like a stockholders' dispute, and, absent undisputed facts substantially determining legal status, denied an injunction at this preliminary stage. *Bayard et al. v. Martin et al.*, 98 A. (2d) 780 (1953). See *e.g. Allied Chemical & Dye Corp. v. Steel & Tube Co., supra; Sandler v. Schenley Industries, Inc., et al., supra.* The Chancery Court ignored Star's position as a collateral security judgment debtor and the applicability of *Burton v. Willin, supra, Staats v. Herbert, supra*, and Petitioners' inadequate legal remedy.

Petitioners appealed to the Supreme Court. Supreme Court, like the Chancery Court, rejects Martin's fraud as a proper consideration, but only because that issue will not be tried in Chancery, and Star is more than a "mere accommodation indorser". *Bayard v. Martin, supra*, 329, 335, 336 (R. 160-169).

In this opinion, *Bayard v. Martin, supra*, 329, 335 the Supreme Court recognizes that Petitioners must rely primarily on Star's status as a collateral security judgment debtor. All alleged principal obligors and the collateral security judgment debtor are parties. The court squarely faces Star's status. Judge Layton has already held that the parties intended these judgments as collateral security (R. 157, 158) and, therefore, their entry did not merge the principal obligation secured by this collateral as to Star or Carter in 1946 (R. 158). Since Ross replaced Carter on the unmerged principal obligations, these Ross obligations still exist independent of these collateral security judgments and support Martin's action against Petitioners in Civil Action No. 320—1952 (R. 157-160).

The Supreme Court again characterizes Star as "co-debtor" and as more than a "mere accommodation indorser" in the 1949 novation because Judge Layton found "valuable consideration" in the 1946 agreement. *Bayard v. Martin, supra*, 329, 335, 336. Again the court ignores

Judge Layton's clear and required characterization of these judgments as collateral security and his consistent subsequent ruling denying that the principal obligations of the 1946 agreement are merged in these judgments (R. 18, 23, 67, 68, 93, 94, 106-108, 157, 158).

2. Although the Supreme Court ignores the relevant facts and necessary legal conclusions, its errors become more serious when applied in conjunction with its previous decision limiting Superior Court's power to control execution on these same judgments. The Supreme Court held that Superior Court, where these judgments are entered, is powerless to stay their execution either pursuant to its inherent common law powers or under *Superior Court Civil Rules* 60(b)(5) and (6); Superior Court is a court of law and its staying execution amounts to issuance of an injunction. The Supreme Court also concludes that it is unable to determine the meaning or purpose of *Superior Court Civil Rules* 60(b)(5) and (6) and in any event, whatever their purpose, it is impossible for court rules to enlarge jurisdiction. *Star Pub. Co. v. Martin, supra,* 835, 839 (R. 131, 132).

While the Supreme Court correctly limits Superior Court's power to enlarge its jurisdiction by promulgating its rules, the court's reasoning ignores the long-established inherent equity power of a law court to control its process. The Superior Court recognized in *Blaustein v. Standard Oil Co.*, 45 A. (2d) 533, 536 (1945), that it controlled its process sufficiently to stay a self-executing order dissolving a foreign attachment of corporate stock to protect appellate jurisdiction—a clear exercise of inherent equity power preventing an unjust consequence otherwise resulting from operation of law. The *Blaustein* opinion concedes that an order dissolving attachment is a self-executing one, which, without a stay provision, destroys the Supreme Court's appellate jurisdiction. *Blaustein v. Standard Oil Co., supra,* 533, 536.

Superior Court Civil Rules 60(b)(5) and (6) applied to this case require a stay of execution on these collateral security judgments until Martin's claim and Petitioners' mandatory counterclaims are tried in Civil Action No. 320—1952, preventing premature payment to Martin before the ultimate balance and direction of liability becomes conclusive. If Superior Court thus controls its process, it exercises its classic common law jurisdiction to prevent abuse of its process; no extension of jurisdiction is required. *Blaustein v. Standard Oil Co., supra,* 533, 536. If Superior Court lacks jurisdiction to stay execution on its judgments for this purpose, *Star Pub. Co. v. Martin, supra,* 835, and Chancery cannot enjoin execution on a law judgment contrary to its expressly intended purpose, *Bayard v. Martin, supra,* 329, then a collateral security judgment freezes the amount of the principal obligation it secures.

This conclusion ignores *Staats v. Herbert, supra,* enjoining execution on a law judgment beyond its intended purpose. These decisions further ignore *Burton v. Willin, supra,* requiring Chancery to enjoin execution on a law judgment to permit establishment of an equitable set-off reducing the balance of the law judgment. The Supreme Court likewise ignores *Blaustein v. Standard Oil Co., supra,* 533, 536 and its premise that "The power of the Court is a power to grant the stay in furtherance of justice, *regardless of the nature of the order stayed.*"

The Supreme Court decisions throughout this litigation ignore the basic purpose of modern procedural rules, and deny Petitioners "due process of law" under the Fourteenth Amendment of the Constitution of the United States. These decisions furnish a firm foundation for complete destruction of the modern procedural rules adopted for both Superior Court and Chancery. If Superior Court cannot compel determination of this *whole controversy* before Martin destroys all possibility of substantial justice through executions on these collateral security judgments and Chancery is equally powerless, then Delaware procedural law functions in a vacuum, its general utility to pro-

mote substantial justice vanishes, and installment sales secured by collateral judgments become a menace to the purchasing public.

Minimum standards of constitutional procedural "due process of law" require that one Delaware court stay execution on these collateral security judgments pending final determination of Petitioners' counterclaims. If Superior Court cannot provide this remedy, *Bayard v. Martin, supra,* 835, Chancery must. To permit their earlier enforcement through executions is to violate Petitioners' rights to "due process of law". Supreme Court characterization of the individual Petitioners' legal status in the 1949 novation, unsupported in the record evidence, cannot obscure this violation. The record evidence supports characterizing these judgments as collateral security; the *record evidence offers no alternative possibility.* The Fourteenth Amendment of the Constitution of the United States and its guarantee of "due process of law" require that the Supreme Court *act only on facts supported in the record. Craig v. Harney,* 331 U. S. 367, 373-4 (1947); *Sterling v. Constantin,* 287 U. S. 378, 398 (1932); *Fiske v. Kansas,* 274 U. S. 380, 385, 386 (1926); *Creswill v. Grand Lodge,* 225 U. S. 246, 261 (1912); *Kansas City Southern Railway Company v. C. H. Albers Commission Company,* 223 U. S. 473 (1912). If so, Supreme Court must direct Chancery to preserve the status quo pending final determination of the direction and the amount of ultimate liability resulting from the 1949 novation in the pending Superior Court Civil Action No. 320—1952.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

13 Delaware Code Annotated (1953).

SUPERIOR COURT CIVIL RULE 13(a).

"(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action."

SUPERIOR COURT CIVIL RULE 24.

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody of, or subject to the control or disposition of the court or an officer thereof.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene."

SUPERIOR COURT CIVIL RULE 60(b).

"(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant any relief provided by statute, or to set aside a judgment for fraud upon the court, or to deal with judgments by confession as provided by law. Writs of coram nobis, coram vobis, and audita querela are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by an independent action."

SECTION 954(b), 2 WOOLLEY ON DELAWARE PRACTICE (1906).

"Judgment Must Be Due. It is not unusual to enter judgments by confession, providing for the payment of the debt at some future period. The entry of judgment with the amount payable at a future date is quite a customary way of making and securing loans. Therefore when a judgment is so entered, execution cannot properly be issued until the judgment is due and payable. If, however, execution be issued before the debt secured by the judgment becomes due and payable, the execution can be avoided only by the defendant. If the defendant see proper not to resist the execution, the court will permit the execution to stand, and will not allow other creditors to attack it collaterally.[2]

"Judgments entered upon bonds and warrants of attorney are entered for the penalty, and while the real debt is indorsed upon the writ, the execution follows the judgment,[3] and is issued for the penalty. Where the condition is not for the payment of money, but for the performance of some collateral undertaking the judgment is entered for the penalty and becomes due upon the breach of the condition. The execution likewise follows the judgment and the creditor proceeds at his peril, subject to the interference of the Court of Chancery, if he take execution before a breach has been committed, or, after a breach, for a larger sum than the damages actually sustained.[4] The Court of Chancery will, in a proper case, restrain such an execution, direct an issue of *quantum damnificatus,* and when the damages are ascertained upon the trial of the issue, grant relief upon the payment of such damages."[1]

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2. Unreported case, heard 1890, N. C. Co.

3. Bradley v. Reed, 1 Harr. 33 (34).

4. Staats v. Herbert, 4 Del. Ch. 508, (517-519): State v. Whitaker, 2 Harr. 137.

1. Staats v. Herbert, 4 Del. Ch., 508.